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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ELISABETH AMY PIUMELLI et al., Defendants and Appellants.	D050674 (Super. Ct. No. SCN208070)

APPEALS from judgments of the Superior Court of San Diego County, Daniel B. Goldstein, Judge. Judgment as to Elisabeth Amy Piumelli affirmed. Judgment as to Jonathan Piumelli affirmed in part, reversed in part.

I.

INTRODUCTION

Jonathan and Amy Piumelli, who are husband and wife, each appeal from a judgment of conviction after a jury trial. Jonathan was convicted of assault with a deadly

weapon, and Amy was convicted of committing a lewd act upon a child 14 or 15 years of age.[1]

The charges against Jonathan and Amy arose from an incident involving Jacob (Jake), a 15-year-old customer of Jonathan and Amy's laser tag business. Jake had been a regular customer of the laser tag business, and Amy befriended him. On the occasion giving rise to the charges, Amy, who was 29 years old at the time, picked up Jake from his mother's house and drove with him to an area where they could walk her dog. Amy and Jake kissed, and, according to Jake's early statements to police, which he later recanted, Amy performed oral sex on Jake. Jonathan found Amy and Jake together in Amy's car and pulled Jake out of the car. Jonathan hit Jake with a golf club a number of times, eventually injuring Jake's testicle to such a degree that Jake required surgery.

Amy's defense was that she suffered from Dissociative Identity Disorder (DID) and that an "alter identity" named "Sarah," who presented as a 14-year-old girl, had been in control while Amy was with Jake. Jonathan claimed that he had used the golf club to pry Jake away from Amy's car because he was afraid of Jake, who was bigger than Jonathan. Jonathan maintained that he did not intend to hit Jake's testicle.

On appeal, Jonathan argues that the trial court abused its discretion and violated his constitutional rights when it denied what he contends was his request for a continuance after he failed to get a full night's sleep the night before being called to testify in his own defense. Jonathan further asserts that the trial court abused its

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1 The jury acquitted Amy of the charge of oral copulation by a person over 21 on a person under 16.

discretion in imposing drug and alcohol testing as conditions of his probation. Finally, Jonathan argues that the trial court improperly imposed a restitution fine pursuant to Penal Code[2] section 290.3, which applies to defendants who are convicted of certain sex offenses.

Amy contends that she was improperly convicted of count 2, the lewd conduct charge, because she did not have sufficient notice that the prosecution intended to rely on conduct other than oral copulation to support that charge. In the alternative, Amy asserts that the trial court erred in failing to give a unanimity instruction as to the lewd conduct count. Amy also claims that the trial court failed to properly instruct the jury on the lesser included offenses of simple assault and simple battery.

Amy further contends that the trial court improperly limited the testimony of her expert witness with regard to his description of DID and the use of the words "conscious" and "unconscious." In a related contention, Amy maintains that the trial court improperly instructed the jury on the defense of unconsciousness. Finally, Amy claims that the trial court abused its discretion by admitting evidence of a prior act of infidelity on her part.

With respect to Jonathan's claims, we conclude that the trial court should not have imposed an alcohol testing probation condition on Jonathan, but that in all other respects, Jonathan's contentions are without merit. We reverse that portion of Jonathan's probation order imposing alcohol testing conditions. The trial court is directed to strike the alcohol testing condition and to strike that portion of the drug testing condition that requires

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2 Further statutory references are to the Penal Code unless otherwise indicated.

Jonathan to submit to alcohol testing. In all other respects, we affirm the judgment as to Jonathan.

With respect to Amy's claims, we conclude that the trial court abused its discretion by admitting evidence of an earlier extramarital affair that Amy had, but that the admission of this evidence was not unduly prejudicial to Amy. In addition, we agree with Amy that the People should have amended the information to delete the phrase "to wit: oral copulation" in the lewd and lascivious conduct charge because, as written, the information indicated to Amy that she would have to defend against only an allegation of oral copulation. However, Amy was on notice before she presented her defense that her conduct in kissing Jake could support the lewd conduct charge. In view of this fact, and given the nature of Amy's defense, we conclude that the outcome of her trial would not have been more favorable to her if the prosecutor had properly charged her at the outset, or if the information had been amended during trial.

With regard to Amy's contention that the court was required to give a unanimity instruction, we conclude that the court did not err. We also reject Amy's contention that the trial court erred in instructing the jury on the lesser related offenses of simple assault and simple battery. Finally, even if we presume that the trial court abused its discretion in limiting the testimony of one of Amy's experts by prohibiting him from using the words "conscious" or "unconscious," we conclude that Amy suffered no prejudice from the limitation. We therefore affirm the judgment as to Amy.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

1. *Amy and Jonathan*

At the time of the incident, Amy and Jonathan had been married for over 10 years. A few months after the two were married, Jonathan noticed that Amy started to display unusual behavior. On the way to an event for Jonathan's work, Amy lost consciousness for approximately 15 to 20 minutes. When she awakened, she did not know who Jonathan was or where she was. Amy's memory did not return for four or five hours.

According to Jonathan, Amy had exhibited other strange behavior over the years. She would go out to run errands and forget how to return home, or she would forget driving rules and end up driving on the wrong side of the road. Beginning in 1996, Amy consulted with a number of neurologists regarding these problems. Amy's doctors believed that she suffered from seizures. In late 2002 or early 2003, a neurologist referred Amy to Dr. Renee Dupont, a neuro-psychiatrist who treated Amy for pseudo-seizures.[3] Over time, Dr. Dupont diagnosed Amy with DID, which was characterized by periods of amnesia and the existence of at least two distinct personalities. Amy would dissociate in the middle of a conversation and not remember what she had been talking about. She sometimes referred to herself in the third person.

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3 Pseudo-seizures are non-epileptic seizures that are psychological, not neurological.

In early 2004, Dr. Dupont referred Amy to a licensed clinical social worker, Dr. Elaine Litton, for psychotherapy. After a year of working with Amy, Dr. Litton suspected that Amy suffered from DID. Dr. Litton based this assessment on subtle shifts in Amy's behavior, attitude, manner of speaking, and tone of voice. Dr. Litton observed these spontaneous shifts on one or two occasions. Dr. Litton identified one of Amy's alter personalities as "Sarah," a 14 or 15 year old.

2. *Jake's involvement with Amy*

Jonathan had been involved in the laser tag business since 1996. In June 2000, Jonathan opened his own laser tag business, Laser Storm Oceanside (Laser Storm). Jake had been a regular weekend customer at Laser Storm for two years prior to the events underlying the charges in this case. Jake and Amy were friendly. Jake would walk Amy out to her car at the close of business, and would occasionally accompany her to other laser tag businesses. He and Amy would talk and walk Amy's dog. Jonathan noticed that Amy and Jake were interacting more frequently and that Jake was spending an inordinate amount of time at Laser Storm. In August or September 2005, Jonathan spoke with Jake in the Laser Storm parking lot. Jonathan told Jake that Jake was to be at Laser Storm only when Jonathan was present, and that Jake was to contact Jonathan before arriving. Despite Jonathan's admonition, Jake continued to see Amy when Jonathan was not present.

In late October and early November 2005, Jonathan found Jake in Amy's car on two occasions. Jonathan told Jake about Amy's mental condition and warned Jake not to

see Amy anymore. Jonathan secretly installed a GPS tracking device on Amy's car. He was concerned that "Sarah" might remove the GPS device if she knew about it.

3. *The incident that led to the criminal charges*

On November 20, 2005, Amy picked up Jake in her car. They planned to walk Amy's dog. Amy drove to a nearby cul-de-sac and parked. Amy and Jake walked the dog into a wooded area. While they were in the wooded area, Amy and Jake kissed. They returned to Amy's car and "made out" while standing near the car. They eventually got back into the car, and may have kissed again while inside the car. Jake testified at the preliminary examination and at trial that he and Amy only kissed that day. However, he previously told investigators that Amy had performed oral sex on him. Jake recanted the statement about the oral sex prior to trial, saying that it had been just his fantasy.

While Amy was with Jake that day, Jonathan called her to make plans for the evening. She seemed distant and secretive, which concerned Jonathan. Jonathan had learned to recognize Amy's personality shifts, and believed that he was speaking with Sarah, not Amy, during that telephone call. Jonathan used the GPS tracking device to locate Amy's car. He drove to the cul-de-sac, where he saw Amy's car parked at the end of the street. Jonathan was concerned that something sexual was going on between Amy and Jake.

Jonathan grabbed a golf club from the trunk of his car and approached Amy's car. Jonathan could see Amy and Jake inside the car, but could not see what they were doing

because of the dark tint on the car's windows.[4] Jonathan tapped on the passenger side window and told Jake to get out. When Jake refused to open the door, Jonathan used his remote control device to unlock the door. Jonathan then opened the door and told Jake to get out. When Jake again refused, Jonathan pulled Jake out of the car by the arm.

Jonathan swung the golf club at Jake, hitting Jake several times. Jonathan asked Jake, "Why my wife?" Jonathan jabbed Jake in the testicles with rubber grip end of the golf club. The golf club broke while Jonathan was hitting Jake with it.

Carlsbad Police Sergeant James Aladits interviewed Jake that evening. Jake's arms and legs were bruised. Jake told Sergeant Aladits that Jonathan approached the car as Amy was performing oral sex on Jake. However, he omitted any discussion of oral sex in his written statement about the incident. In subsequent interviews, as well as at trial, Jake denied that Amy had performed oral sex on him. Aladits interviewed two people who lived in the neighborhood where the incident took place and who had witnessed much of the incident. Both testified at trial that they saw Amy and Jake talking and kissing near Amy's car for as long as 45 minutes or an hour.

Jake continued to have pain and swelling in his testicle, so he went to the hospital. Dr. Michael Guerena, M.D., performed surgery on Jake's testicle because the testicle cover had been broken and was bleeding into the scrotum. Dr. Guerena had to remove a portion of the testicle in order to repair a laceration. Dr. Guerena opined that Jake might have fertility issues in the future.

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[4] Very soon after the incident, Jonathan called Dr. Elaine Litton, Ph.D., Amy's doctor, and indicated to Dr. Litton that he had found Amy performing oral sex on Jake.

4. *Amy's and Jonathan's defenses*

Amy presented evidence that she was mentally ill and suffered from DID. According to her doctors, Amy had an alternative personality named "Sarah." Sarah was a 14 or 15-year-old girl who was very manipulative. Sarah was in control when Amy was with Jake, and Amy was not aware of her actions while Sarah was in control.

On the day of the incident, Jonathan asked Jake to get away from the car and to go home, but Jake did not move. Jake stood by the car with his shoulders back and his chest out, staring at Jonathan. Jonathan interpreted the look on Jake's face to mean that Jake was going to become violent toward Jonathan, so Jonathan used the golf club to try to move Jake away from the car. Jonathan may have unintentionally hit Jake in the testicles when he was prodding Jake in the stomach.

B. *Procedural background*

Jonathan and Amy were tried together before a jury. On February 26, 2007, the jury convicted Jonathan of assault with a deadly weapon by means of force likely to cause great bodily injury (§ 245, subd. (a)(1)), and found true the allegations that Jonathan personally inflicted great bodily injury (§ 12022.7, subd. (a)) and personally used a deadly weapon, a golf club (§ 1192.7, subds. (c)(8), (23)).

The jury convicted Amy of committing a lewd act upon a child 14 or 15 years of age (§ 288, subd. (c)(1) (count 2)). The jury acquitted Amy of the crime of oral copulation by a person over 21 on a person under 16 (§ 288a, subd. (b)(2) (count 1)).

On March 27, 2007, the trial court placed Jonathan on formal probation for a period of five years. That same day, the court sentenced Amy to two years in state prison.

Amy filed a timely notice of appeal on April 3, 2007. Jonathan filed a timely notice of appeal on May 8, 2007.

III.

DISCUSSION

A. *Jonathan's arguments on appeal*

1. *Jonathan's arguments that the trial court improperly denied his request for a continuance after he had been up all night are without merit because Jonathan never clearly requested a continuance*

Jonathan contends that the trial court abused its discretion in denying his request to continue the trial so that he would not have to testify the day after he had been awake most of the night because a houseguest had attempted suicide. He further argues that the trial court's denial of his request for a continuance effectively forced him to testify in a sleep-deprived state, which violated his constitutional rights to present a defense, to assist in his own defense, and to testify in his own behalf.

Jonathan's arguments are based on the premise that he adequately requested a continuance, which the court then denied. However, the record discloses that Jonathan did not in fact request a continuance. Further, there is no authority to support Jonathan's assertion that he was deprived of his due process rights under these circumstances.

a. *Additional background*

Before the second morning of testimony began, Jonathan's attorney told the court about an incident that had occurred at the Piumelli home the night before:

> "Mr. Wolfe[5]: My client informed me that there has been a person who has been sitting in court the entire time, her name is Barb, short dark hair, sitting with family, Amy's best friend from Del Amo. Last night, after John and Amy went to bed, Barb hacked herself to pieces in their home. Paramedics were called. Jonathan and Amy were interviewed by the police. Apparently she has been treated in the hospital medically. And then when that's over, she also got a 5150 hold. [¶] Amy witnessed this post-scene; came out and found her after it was over. Didn't see it actually occur, but gave some sort of statement to the police. And Jonathan has been up, obviously, all night dealing with paramedics and police and Amy and doing what he can to clean up the scene at his house. So now there is new police reports [*sic*] out there. The only – first of all, I felt an obligation to bring it up.
>
> "The Court: Thank you.
>
> "Mr. Wolfe: Second of all, and I think apparently Ms. Trevino has checked with Carlsbad PD and there was some sort of scene at their house.
>
> "The Court: What's the level of injury?
>
> "Mr. Wolfe: Jonathan tells me there are chunks of flesh lying on his floor. . . .
>
> "The Court: Does she have a relationship with either one of the defendants?
>
> "Ms. Trevino: She met ─
>
> "Mr. Wolfe: Well ─

5 In the reporter's transcript, Jonathan's attorney is identified as "Mr. Wolfe." The prosecutor is identified as "Ms. Trevino." Amy's attorney is identified as "Mr. Layon."

"Ms. Trevino: She met Amy, or Sarah, I am not sure which one, at Del Amo. They became friends and I guess she is staying with them right now.

"The Court: All right. Anything else?

"Mr. Wolfe: The other reason I bring that up is having been up all night, if we get to the point where he is going to be examined at [*sic*] he'll prefer not to, having been up all night and hasn't had a full night's sleep.

"The Court: That would be nice in a perfect world."

"Mr. Wolfe: Okay. . . .

[¶] . . . [¶]

"The Court: All right. Well, let's bring the jury in and just keep going in this trial.

"Mr. Wolfe: Okay."

Before the lunch recess, the prosecutor informed the court that she planned to complete her examination of the prosecution witnesses that afternoon. The court said, "So we could be moving into the defense case today. I'll let you guys work on that. Anything else that I need to deal with before the jury comes back at 1:30 [p.m.]?" Jonathan's attorney did not raise the issue of a continuance or mention any concern about Jonathan testifying.

After the lunch break, the prosecutor continued with her case-in-chief. The prosecutor rested just before 3:00 p.m. After some discussion about the admissibility of certain of the prosecutor's evidence, the trial court said, "All right. So at three o'clock what are we doing?" At this point, counsel for the defendants moved for a judgment of acquittal based on insufficiency of the evidence, pursuant to section 1118. The trial court

considered and denied the motion. The court then asked, "Okay. So what else we got?" Jonathan's attorney replied, "Well, I think I am going to try and get a hold of [Officer James] Aladits and see if we can get him back in." The court clarified that counsel intended to recall Officer Aladits to ask him one or two questions for impeachment purposes, and asked, "What else?" The following colloquy then occurred:

> "Mr. Wolfe: That's it as far as Aladits goes. And then after that I guess it's defense's case; correct.
>
> "The Court: Well, the defense case would be Aladits, unless you are going to put on any other evidence.
>
> "Mr. Wolfe: Right, I understand. But, I mean, in terms of new witnesses, yes.
>
> "The Court: Okay. I am not taking a break at three o'clock for the evening, so what are we going to do?
>
> "Mr. Wolfe: Well, if we are not taking a break, I guess we are going forward.
>
> "The Court: Right. Who's going to proceed, Mr. Layon or Mr. Wolfe?
>
> "Mr. Wolfe: Mr. Wolfe.
>
> "The Court: And, Mr. Wolfe, do you have a witness lined up?
>
> "Mr. Wolfe: Yes, just about the same as yesterday. There is not much I can do about that."
>
> [The court and the defense attorneys then discussed which experts they planned to call to the stand. After a few minutes of discussion and a recess, the court reopened the proceedings in the presence of the jury.]
>
> "The Court: Okay. We have got all counsel, the defendants and ladies and gentlemen of the jury. [¶] And the People rest?

"Ms. Trevino: Yes.

"The Court: All right. Is the defense ready to proceed?

"Mr. Layon: Yes, Your Honor.

"The Court: All right. Call your first.

"Mr. Wolfe: Thank you, Your Honor. [¶] The defense calls Jonathan Piumelli."

b. *Analysis*

(i) *Jonathan did not request a continuance*

Jonathan's argument rests on his assertion that he requested a continuance, and that the court denied his request. The record does not support Jonathan's assertion. At no time did defense counsel clearly ask the court for a continuance. Jonathan's attorney's indication to the court that Jonathan "preferred" not to testify that day did not sufficiently inform the court that Jonathan was contending that he was unable to adequately present his case due to sleep deprivation or exhaustion. Further, when the trial court indicated its desire to continue moving forward with the trial, counsel never stated that moving forward would prejudice his client, or that his client was specifically requesting a continuance.

In response to the People's argument that he failed to actually request a continuance, Jonathan asserts that the People are "questioning Jonathan's failure to file a written motion." However, this is not what the People contend. Rather, the People merely point out what this court has noted — that Jonathan's counsel never actually requested a continuance orally, let alone in writing.

Perhaps tacitly acknowledging that there was no request for a continuance, Jonathan later argues that "[t]rial counsel's request that the sleep-deprived Jonathan not be required to testify was *akin* to seeking a continuance due to the unavailability of a witness." (Italics added.) However, at the time trial counsel stated that Jonathan would prefer not to have testify that day, there was no discussion of any other defense witnesses and whether they would be available. Nor was there any discussion of how the attorneys for the defendants intended to proceed, or the order in which they were planning to call witnesses.[6] It became clear that defense counsel might be planning to call Jonathan to testify that day only after the prosecution rested that afternoon. Yet, at no time after this point did defense counsel raise the issue of a continuance or even mention Jonathan's preference not to testify that day.

It was apparently the two defense attorneys who decided that they wanted to proceed with Jonathan's defense first, and that Jonathan would be the first witness called to testify. This decision was not made by the trial court. The fact that the trial court did not, sua sponte, raise the issue of continuing the trial once defense counsel called Jonathan is clearly not an abuse of discretion.

Jonathan notes that although he could find no California case on point, "at least one other state's highest court has . . . held that no magic words are required to make a continuance request, as long as it is clear that the request is 'for the trial to stop.'" (See

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6 It appears from the record that the trial court did not know how the defense intended to proceed, as indicated by the court's inquiry of the attorneys as to which of them was planning to call the first defense witness.

Carraway v. State (Miss. 1990) 562 So.2d 1199, 1205, fn. 6 (*Carraway*).) This is precisely the problem with the purported "request" here—it was not clear that counsel was asking for a continuance at the beginning of the day, and by the time that it was clear that Jonathan would be called to testify, defense counsel did not indicate in any way that he wanted to stop the trial.[7]

In addition to failing to establish that his attorney in fact requested a continuance of the trial, Jonathan has not established that the court's proceeding with the trial and his having to testify for approximately an hour actually prejudiced him. During that hour, Jonathan did not testify about the events that occurred on the day the offenses were alleged to have occurred. Nor did he discuss his defense to the allegations. Rather, he testified about his history with Amy and her mental disorder. Jonathan asserts that his defense "was predicated on his wife's mental health history, [which made] her vulnerable

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[7] In *Carraway*, the court was discussing whether a party must use the words "I move for a continuance," in a very narrow context. At issue was the authority of a trial court to exclude evidence that the defense had not provided to the prosecution, in the absence of a specific request for a continuance on the part of the prosecution in light of the new evidence. (*Carraway, supra*, 562 So.2d at p. 1203.) The law in Mississippi had previously required the aggrieved party to request a continuance before the trial court could exclude the evidence; a party's failure to request a continuance constituted a waiver of the issue, although the court could make an exception for the state if the defendant had willfully violated the discovery rules. (*Ibid*.) A secondary question that arose in earlier cases was whether the aggrieved party had to use the specific words, "I move for a continuance," in order to meet the procedural requirements that would allow the trial court to exclude the challenged evidence. (*Id*. at p. 1205.) It was in this very narrow circumstance that the *Carraway* court made its comments about "no magic words" being required. Further, the *Carraway* court itself presented what appear to be contradictory positions on the issue of what was required under the statute. While the court noted that "there is no magic words requirement," the court concluded that because the state had not "'utter[ed] those rabbit's foot words "I move for a continuance,"'" the court "should not have excluded the evidence." (*Ibid*.)

to alleged victim Jake's advances." He contends that he was "deprived of his only percipient witness, himself." However, there is nothing in the record to suggest that Jonathan faltered during his testimony, that he was not capable of participating in the proceedings, or that he suffered from a failure of memory or insight as a result of being overly tired. We conclude that the trial court did not abuse its discretion in failing to continue the trial, because Jonathan did not clearly request that the court do so.

(ii) *The trial court did not violate Jonathan's constitutional rights*

Jonathan asserts that the trial court's failure to continue the trial deprived him of his constitutional rights to present a defense, to assist in his own defense, and to testify in his own defense. We disagree. Jonathan never expressly requested a continuance, and he has offered no authority for the proposition that the court has an independent duty to order a continuance in such a circumstance. Further, even if Jonathan had asked for a continuance and the court had denied the request, he could not establish that this would have been a due process violation.

Jonathan's constitutional complaints are based on the presumption that the trial court denied his motion for a continuance. Since no such motion was made or even clearly indicated, the trial court did not deny a request for a continuance. Further, Jonathan assumes that his having to testify while tired equates with being unable to properly testify, to present a defense or to assist in his defense. However, Jonathan clearly was not prevented from presenting his case, and the record does not disclose that he had any difficulty responding to his attorney's questions or presenting a coherent

narrative of the history of his wife's mental illness during this portion of his examination.

As Jonathan notes, due process prohibits the trial of an incompetent defendant who is so mentally impaired as to be unable to rationally assist his counsel in conducting the defense. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 1001-1002 (*Jenkins*).) There is nothing in the record that demonstrates that Jonathan was unable to rationally assist his counsel in conducting his defense.

Jonathan relies predominantly on language from cases in which the defendant's sleep deprivation was caused by problematic jail procedures. In these cases, the state was to blame for the defendants' sleep deprivation. For example, in *Dillard v. Pitchess* (1975) 399 F.Supp. 1225, 1237, the due process violation was that the defendants had been "denied the opportunity for a reasonable night's sleep before each day of . . . trial" as a result of local jail procedures that required prisoners to be awakened at 3:30 a.m. on days on which they had court appearances. Similarly, in *Jenkins, supra,* 22 Cal.4th at pages 999-1002, the defendant challenged a number of conditions of his confinement, including a transportation schedule that he claimed deprived him of adequate sleep. The *Jenkins* court ultimately rejected the defendant's arguments that the conditions of his confinement "interfered with his ability to communicate with counsel or assist in the defense as to constitute a violation of [his] rights to due process or the effective assistance of counsel." (*Id*. at pp. 1002-1003.)

Jonathan also relies on *People v. Smith* (1985) 38 Cal.3d 945, 953-956. In *Smith*, the Supreme Court rejected a jailed defendant's claim that he was not given an

opportunity to get sufficient sleep on the night before his trial, concluding that the defendant's position was "unsupported both factually and legally." (*Id*. at p. 953.) The *Smith* court noted that the defendant's reliance on cases involving challenges to jail conditions did not support the defendant's assertion that the court should have either held a hearing to determine whether the defendant had been given the opportunity to get eight hours of sleep, or suspended the trial. (*Id* at. p. 955.) In the cases on which Smith was relying, the courts were concerned "not with affording prisoners the opportunity for eight hours of sleep, but ensuring that no defendant 'is so worn out . . . that he lacks the alertness to help his attorney or to try to "put his best foot forward" in the presence of the trier of fact.' [Citation.]" (*Id.* at pp. 955-956.) As in *Smith*, there is nothing in the record to suggest that Jonathan was not alert and "capable of participating in the proceedings." (*Id*. at p. 956.)

The state was not responsible for Jonathan's inability to get a reasonable night's sleep. Rather, his lack of sleep was due to extraneous events that took place at his home. We conclude that the trial court's failure to continue the trial, sua sponte, because Jonathan did not get a full night's rest, did not violate due process or prevent Jonathan from testifying, presenting a defense, or assisting in his own defense.

2. *The trial court erred in imposing alcohol testing conditions as part of Jonathan's probation*

Jonathan contends that the trial court abused its discretion in imposing alcohol and drug testing as conditions of his probation. Specifically, Jonathan challenges the court's order that he (1) "[w]henever requested by the P.O., a law enforcement officer, or the

court ordered treatment program, submit to any chemical test of blood, breath, or urine to determine the blood alcohol content and authorize release of results to P.O. or the court," and (2) "[n]ot use or possess any controlled substance without valid prescription and submit a valid sample for testing for use of controlled substances/alcohol when required by the probation or law enforcement officer, or treatment provider." According to Jonathan, the court should not have imposed these conditions because there was no evidence that drugs or alcohol played any role in Jonathan's crime or that "alcohol or drugs were a part of Jonathan's lifestyle at all."

Courts are statutorily authorized to grant probation and to impose reasonable probation conditions. Section 1203.1, subdivision (j) provides in pertinent part, "The court may impose and require . . . other reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer, and that should the probationer violate any of the terms or conditions imposed by the court in the matter, it shall have authority to modify and change any and all the terms and conditions and to reimprison the probationer in the county jail within the limitations of the penalty of the public offense involved."

The Supreme Court "has repeatedly set out the boundaries of a trial court's discretion to impose probation under various terms and conditions, and the standard of review of these determinations is abuse of discretion." (*People v. Balestra* (1999) 76 Cal.App.4th 57, 65 (*Balestra*).) "'In granting probation, courts have broad discretion to

impose conditions to foster rehabilitation and to protect public safety pursuant to Penal Code section 1203.1.' [Citation.]" (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) However, a trial court's discretion "is not without limits: a condition of probation must serve a purpose specified in the statute." (*Id*. at p. 1121.)

Under section 1203.1, probation conditions that regulate conduct "'not itself criminal'" must be "'reasonably related to the crime of which the defendant was convicted or to future criminality.' [Citation.]" (*People v. Carbajal, supra*, 10 Cal.4th at p. 1121.) "As with any exercise of discretion, the sentencing court violates this standard when its determination is arbitrary or capricious or ""exceeds the bounds of reason, all of the circumstances being considered.'" [Citations.]' [Citation.]" (*Ibid.*)

In reviewing a trial court's imposition of probation conditions, appellate courts apply the test announced in *People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*): "A condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' [Citation.]" Because the *Lent* test is written "in the conjunctive, . . . the three factors must all be found to be present in order to invalidate a condition of probation." (*Balestra, supra*, 76 Cal.App.4th at p. 65, fn. 3.)

With respect to the drug testing condition, because the use of illicit substances is criminal, a probation requirement that the probationer undergo testing for illicit substances relates to conduct that is criminal. (*In re Kacy S.* (1998) 68 Cal.App.4th 704, 710 [upholding minors' drug and alcohol testing probation conditions where drug and

alcohol use were not involved in the offense or the minors' social histories].) The *Kacy S.* court reasoned that the drug testing condition "is designed to detect the presence of substances whose use by minors is *unlawful*. [Citations.] Thus, the testing "'relates to conduct which is . . . in itself criminal.'" [Citation.]" (*Id.* at p. 710.) Unauthorized use and/or possession of the illicit substances that drug testing is intended to detect is criminal for adults, just as it is for minors. The rationale in *Kacy S*. regarding drug testing is thus applicable to adult probationers, as well.[8] Because the drug testing condition that the trial court imposed relates to drug use, which is itself criminal, the condition does not meet the second *Lent* requirement, and is therefore a valid condition. The trial court did not abuse its discretion in imposing this condition.[9]

However, the alcohol condition that the trial court imposed does not meet the three *Lent* factors. Alcohol played no part in the crime for which Jonathan was convicted. Alcohol possession and consumption is not an illegal activity, and the court did not mark the box on the probation order that would have required Jonathan to "[t]otally abstain from the use of alcohol." The alcohol testing condition therefore cannot even be said to have a deterrent effect as to unlawful conduct. Further, because there is no evidence that

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8 As noted in *Balestra*, the drug testing condition is intended to aid the probation officer in ensuring that the probationer comply with "the fundamental probation condition, to obey all laws." (*Balestra, supra*, 76 Cal.App.4th at p. 68.)

9 The drug testing provision ostensibly requires that Jonathan submit a sample for "testing for the use of" both "controlled substances" and "alcohol." For the reasons we shall explain, that portion of the drug testing condition requiring Jonathan to submit a sample for testing for the use of alcohol is stricken, together with the separate alcohol testing condition.

Jonathan abuses alcohol or that he has abused alcohol in the past, there is no basis for assuming that imposing an alcohol testing condition on Jonathan would prevent future criminality on his part. We conclude that the trial court's imposition of an alcohol testing condition does not serve a purpose identified in the statute, and that the condition must therefore be stricken.

The People cite *Balestra, supra*, 76 Cal.App.4th at pages 61-62 as providing support for the imposition of both the drug and alcohol testing conditions in this case. The People contend that here, as in *Balestra*, "the challenged drug and alcohol testing conditions were imposed to aid the probation department in ensuring that Jonathan complied with the general probation condition that he obey all laws and complete probation." However, the appellant in *Balestra* did not challenge the alcohol testing condition that the trial court had imposed. Rather, the defendant challenged on appeal only the drug testing probation condition. (*Balestra, supra*, 76 Cal.App.4th at p. 64.) Further, the defendant in *Balestra* had consumed alcohol immediately before committing the crime charged, and the trial court commented at sentencing that the defendant needed treatment for "'what everybody appears to agree is an alcohol problem.'" (*Id*. at p. 62.) Here, as noted above, there was no evidence that Jonathan consumed alcohol before or during the crime, or that he had ever had a problem with alcohol.

Although the *Balestra* court noted that a trial court possesses "broad discretion in imposing terms of probation, particularly where those terms are intended to aid the probation office in ensuring the probationer is complying with the fundamental probation condition, to obey all laws" (*Balestra, supra*, 76 Cal.App.4th at p. 69), the court at the

same time reaffirmed the principles announced in *Lent, supra*, 15 Cal.3d at page 486, regarding when a condition of probation may be held to be invalid. Thus, *Balestra* supports our conclusion in this case, i.e., that a probation condition requiring alcohol testing be both rehabilitative and have some nexus to the crime of which the defendant was convicted. Because the alcohol testing condition imposed in this case has no nexus to Jonathan's crime, it cannot be seen as being rehabilitative or as bearing any reasonable relationship to Jonathan's future criminality.

3. *The trial court did not impose a sex offender registration fee on Jonathan*

Jonathan asserts that "the fees 'Calculator' that bears his name shows a 'Sex Offender Registrant Fee' pursuant to section 290.3 in the amount of $300." He complains that "[i]f such a fee was actually imposed, it was unauthorized and should be struck" because he was not convicted of any offense specified in section 290.3. The People agree that it would be improper to require Jonathan to pay a $300 fine pursuant to section 290.3. However, the document to which Jonathan refers is part of a proposed probation order that was attached to Jonathan's probation report. The judge did not sign the proposed order, and the order was never filed by the court clerk. The document in question is stamped "RECOMMENDATION ONLY" in large letters. Both the signed probation order and the judgment establish that the trial court did not impose a section 290.3 fine on Jonathan.

B. *Amy's arguments on appeal*

1. *Amy's conviction on count 2 for committing a lewd act upon a child was not obtained in violation of her right to due process*

Amy contends that her conviction on count 2 must be reversed because the conviction violated her right to due process. According to Amy, she was "misled and inadequately informed of the charge against her" in count 2 because the prosecutor "opted to specify . . . oral copulation[] as the basis" for the charge. Amy asserts that she was thereby put on notice only "to defend against the claim she orally copulated Jacob." (Italics omitted.) Alternatively, Amy claims that the trial court committed reversible error in failing to give a unanimity instruction if she could be convicted of committing a lewd act upon a child based on conduct other than oral copulation.

a. *Additional background*

The information charged Amy in count 1 as follows:

> "On or about November 20, 2005, ELISABETH AMY PIUMELLI, being over 21 years of age, did unlawfully participate in an act of oral copulation with JACOB T., a person under the age of 16 in violation of PENAL CODE SECTION 288a(b)(2)."

The information charged Amy in count 2 as follows:

> "On or about November 20, 2005, ELISABETH AMY PIUMELLI did willfully, unlawfully and lewdly commit a lewd and lascivious act upon and with the body and parts and members thereof, of JACOB T., a child fourteen or fifteen years of age, the defendant being at least 10 years older than the child, with the intent of arousing, appealing to and gratifying the lust, passions and sexual desires of the said defendant(s) and the said child (to wit: ORAL COPULATION), in violation of PENAL CODE SECTION 288(c)(1)."

At the preliminary hearing, Jake testified that his relationship with Amy became sexual, and that he held her and kissed her. Jake specifically testified that on November 20, 2005, the only sexual conduct that occurred between him and Amy was hugging and kissing. Although Jake admitted that he had originally told Sergeant Aladits that Amy had performed oral sex on him that day, he testified that he had simply fantasized about that having occurred.

b. *The trial court did not commit reversible error in permitting the jury to convict Amy on count 2 based on kissing, as well as oral copulation*

According to Amy, by specifying the particular act, oral copulation, in the lewd conduct charge set forth in count 2, "the prosecution was limited to proof of that act, and an amendment would have been required, with notice, to enlarge the scope of the pleaded acts." She claims that the prosecution's failure to amend the information deprived her of her constitutional right to due process. Although the trial court may have erred in failing to require that the prosecution amend the complaint to delete the oral copulation reference in count 2 if the prosecutor intended that conduct other than oral copulation could result in a conviction on that count, any such error was harmless in the unusual circumstances of this case.

"Due process of law requires that an accused be advised of the charges against him so that he has a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial. [Citation.]" (*People v. Jones* (1990) 51 Cal.3d 294, 317 (*Jones*).) In keeping with due process requirements, the Penal Code sets forth the standards for charging documents. Section 950 requires that an accusatory

pleading contain: "1. The title of the action, specifying the name of the court to which the same is presented, and the names of the parties; [¶] 2. A statement of the public offense or offenses charged therein." Section 951 provides:

> "An indictment or information may be in substantially the following form: The people of the state of California against A.B. In the superior court of the state of California, in and for the county of _____. The grand jury (or the district attorney) of the county of _____ hereby accuses A.B. of a felony (or misdemeanor), to wit: (giving the name of the crime, as murder, burglary, etc.), in that on or about the _____ day of _____, 19_____, in the county of _____, State of California, he (here insert statement of act or omission, as for example, 'murdered C.D.')."

Section 952 further describes the kind of statement that is necessary in order to sufficiently charge an offense:

> "In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused. In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another."

The charging document is not the sole means for providing a defendant notice of the charges against him or her. "'It is clear that in modern criminal prosecutions initiated by informations, the transcript of the preliminary hearing, not the accusatory pleading, affords defendant practical notice of the criminal acts against which he must defend.'" (*Jones, supra*, 51 Cal.3d at p. 317.) "[T]he information has a 'limited role' of informing defendant of the kinds and number of offenses; 'the time, place, and circumstances of

charged offenses are left to the preliminary hearing transcript,' which represents 'the touchstone of due process notice to a defendant.' [Citations.]" (*Id.* at p. 312.) "'[A]t a minimum, a defendant must be prepared to defend against all offenses of the kind alleged in the information as are shown by evidence at the preliminary hearing to have occurred within the timeframe pleaded in the information.' [Citation.]" (*Id*. at p. 317.) Consistent with this understanding of notice requirements sufficient to satisfy due process, section 1009 provides in relevant part:

> "The court in which an action is pending may order or permit an amendment of an indictment, accusation or information, or the filing of an amended complaint, for any defect or insufficiency, at any stage of the proceedings, or if the defect in an indictment or information be one that cannot be remedied by amendment, may order the case submitted to the same or another grand jury, or a new information to be filed. . . . An indictment or accusation cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination."

As explained in *People v. Winters* (1990) 221 Cal.App.3d 997, 1005, "Section 1009 authorizes amendment of an information at any stage of the proceedings provided the amendment does not change the offense charged in the original information to one not shown by the evidence taken at the preliminary examination. If the substantial rights of the defendant would be prejudiced by the amendment, a reasonable postponement not longer than the ends of justice require may be granted. The questions of whether the prosecution should be permitted to amend the information and whether continuance in a given case should be granted are matters within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent a clear abuse of discretion. Moreover, a

trial court correctly exercises its discretion by allowing an amendment of an information to properly state the offense at the conclusion of the trial."

Here, the charging document alleged the offense of lewd and lascivious conduct, which can be committed in a number of ways. If the offense of lewd and lascivious conduct had been alleged without reference to specific underlying conduct, the charging document would have been sufficient to provide adequate pleading notice of the charge in question. (See § 952 [statement that accused has committed a public offense "may be in the words of the enactment describing the offense"].) The unique problem presented in this case is that the prosecutor did not merely set forth the offense of lewd and lascivious conduct, but went on to specify "to wit: ORAL COPULATION" in reference to the lewd act. The addition of these words narrowed the universe of conduct that the charging document alleged.

At trial, the prosecution presented evidence that Amy kissed Jake in a romantic way. This constitutes evidence that could support a conviction for lewd and lascivious conduct. (See *People v. Martinez* (1995) 11 Cal.4th 434, 444-445 [*any* touching of a child is "lewd or lascivious" under § 288 "where it is committed for the purpose of sexual arousal"].) Amy asserts that by "specifying [a] particular act [i.e., oral copulation], the prosecution was limited to proof of that act, and an amendment would have been required, with notice, to enlarge the scope of the pleaded acts."

We agree with Amy's contention that there was error here. If the prosecution intended to rely on conduct other than oral copulation to prove the lewd conduct charge, the prosecutor should have moved to amend the information to conform to the proof

presented at the preliminary hearing. Further, the court should have required such an amendment before instructing the jury that it could convict Amy of lewd conduct based on an act or acts other than the specific act charged in the information. We therefore consider whether the error was prejudicial.

Assuming that the failure to amend the charging document to eliminate the reference to oral copulation in count 2 was an error of constitutional dimension, and reviewing the error under the "harmless beyond a reasonable doubt" standard announced in *Chapman v. California* (1967) 386 U.S. 18, 24, we conclude that Amy was not prejudiced by the fact that the jury was permitted to consider her conduct in kissing Jake as constituting the lewd conduct charged in count 2.

Amy's protests that she "was never informed she would have to defend against a charge of kissing Jacob," and that she was therefore prejudiced when "at the last moment the jury was asked, and allowed, to convict on the basis of different, lesser conduct [than oral copulation]." However, the defense was made aware of the possibility that the "making out" conduct could constitute a lewd act prior to the time that Amy presented her defense. After the prosecution rested and before the presentation of defense evidence, in response to the defendants' motions to dismiss the charges pursuant to section 1118, the trial court clearly stated that Amy's kissing Jake could support a finding of guilt on count 2:

> "As to Count 2, the general intent or the specific intent along with a different type of touching, a reasonable jury could find, even if they don't believe there was the oral copulation, that the mere kissing, if they believe it is for lewd and lascivious contact, there is enough there to go to the jury. So as to those counts, the motion is denied."

Amy's counsel did not indicate any surprise at the court's statement, nor did he request a continuance. This suggests that defense counsel was not, in fact, surprised by the court's statement that evidence of conduct other than oral copulation could support a conviction on count 2. In view of the trial court's comments and the lack of any indication on the record that counsel was surprised by these remarks, it is difficult to conclude that Amy was actually misled about the conduct she would have to defend against prior to presenting her defense.

More significantly, the record does not demonstrate that Amy was prejudiced by the failure to amend the charging document to conform to the evidence. In particular, there is nothing in the record that suggests that Amy could have, or would have, presented a defense to the kissing conduct different from the defense of unconsciousness that she presented. Amy's defense regarding virtually all of her activities on the day in question was that her alter identity, Sarah, was present with Jake, and that Amy was unconscious of everything that took place between Sarah and Jake. It is difficult to conceive of what additional or different defense Amy might have presented if the prosecution had appropriately amended the information to conform with the facts that were elicited at the preliminary hearing, as Amy argues it should have, and Amy does not identify anything that she would have done differently if the scope of count 2 had been broadened by an amendment. Amy's only argument that she was prejudiced by this error is a general suggestion that she might have challenged whether the other conduct had in fact occurred.

However, there is no reasonable probability that the jury would have concluded that Amy did not commit the offense charged in count 2, even if Amy had attempted to convince the jury that she and Jake only talked that day, without touching each other, or alternatively, that the kissing was innocuous and did not meet the requirements of lewd and lascivious conduct. There was overwhelming evidence that the kissing occurred. Two eyewitnesses testified that they saw Amy and Jake kissing and "making-out," and Jake himself admitted that the kissing occurred, and that it had been "sexual" in nature. One witness described Amy and Jake's activity as "making-out-type of passionately kissing", and another said that they were engaged in a "boyfriend/girlfriend kiss." Amy has not suggested that there is any evidence she could have presented that would have supported a defense that no lewd or lascivious conduct occurred that day. If such evidence existed, it is difficult to imagine why Amy would not have presented that evidence as part of her defense to the charges, since such evidence would have supported her defense with respect to the oral copulation, as well.

In addition, Amy's attorney never objected to the prosecutor's argument that kissing was sufficient to support a conviction on the lewd conduct charge. If Amy had had other possible defenses to the kissing as lewd conduct, her attorney presumably would have raised the issue and claimed prejudice in the trial court. Defense counsel was aware of the potential for a conviction based on conduct other than oral copulation, at a minimum, after the attorneys for both defendants moved to have the charges dismissed pursuant to section 1118, since, in response to Amy's section 1118 motion, the trial court clearly outlined the possibility that the kissing could support a conviction on count 2.

Amy's counsel did not challenge the court's interpretation of the evidence or its application to the offense charged.

Amy's counsel also did not request a continuance to address this seemingly different theory as to count 2. Instead, counsel proceeded with Amy's defense. Significantly, despite having been told by the judge that the kissing conduct could form the basis for a conviction on the lewd and lascivious conduct charge, Amy's attorney presented her defense that she was unconscious during all of the relevant events.

Moreover, while Amy contends on appeal that the two counts covered exactly the same conduct, i.e., oral copulation, during closing argument Amy's attorney addressed the charges in counts 1 and 2 very differently. With respect to count 1, defense counsel directly addressed the sufficiency of the evidence of oral copulation, challenging that evidence by questioning Jake's credibility and pointing out that Jake had repeatedly reversed his position as to whether the oral copulation had occurred. However, with respect to count 2, defense counsel did not even raise the issue of Jake's unreliable testimony. Instead, counsel focused on the defense position that Amy was unconscious during her contact with Jake that day, such that Amy could not have formed the requisite intent to commit a lewd act. The fact that defense counsel addressed the two counts so differently during closing argument, without ever raising the issue of the kissing constituting a "new" theory, evidences two important points. First, it provides additional confirmation that defense counsel was not surprised by the prosecutor's argument that conduct other than oral copulation could support a conviction on count 2. Second, it

provides further confirmation that Amy did not have any defense to offer with respect to the kissing conduct, other than the DID defense.

There is no reason to believe that Amy would have presented a different defense if the information had been amended to delete the reference to oral copulation as the conduct underlying the charge of lewd and lascivious conduct, or that Amy was prejudiced as a result of the way the charging document was phrased. Amy was aware as of the time of the preliminary hearing that the prosecution intended to present evidence that she kissed Jake on the day in question. The evidence that she engaged in that conduct was overwhelming. The jury clearly did not believe her claim that it was Sarah, not Amy, who was present with Jake on November 20, 2005. We conclude beyond a reasonable doubt that even if the error in the charging document had been remedied, Amy would not have received a more favorable result.

c. *The court's failure to give a unanimity instruction with regard to count 2 does not require reversal*

In a related argument, Amy contends that if conduct other than oral copulation could form the basis of a conviction on count 2, then the trial court erred in not instructing the jury that all jurors must unanimously agree that she was responsible for one discrete criminal event, i.e., one particular act, in order to convict her on that charge.

"[T]he jury must agree unanimously the defendant is guilty of a *specific* crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must

require the jury to agree on the same criminal act. [Citations.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132 (*Russo*).)

"This requirement of unanimity as to the criminal act 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.' [Citation.]" (*Russo, supra*, 25 Cal.4th at p. 1132.) "'The [unanimity] instruction is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done *something* sufficient to convict on one count.' [Citation.]" (*Ibid*.) However, "'[t]he unanimity instruction is not required when the acts alleged are so closely connected as to form part of one transaction.' [Citation.]" (*People v. Benavides* (2005) 35 Cal.4th 69, 98.) Similarly, a unanimity instruction is not required where the criminal acts constitute a "continuous course of conduct." (*People v. Diedrich* (1982) 31 Cal.3d 263, 282.)

Even if a unanimity instruction is not requested, the trial court has a duty to give the instruction whenever the evidence warrants it. (*People v. Carrera* (1989) 49 Cal.3d 291, 311, fn. 8,)

Amy contends that there were multiple acts that could have formed the basis for her lewd conduct conviction, and that a unanimity instruction was therefore required. In her opening brief, Amy contends that the prosecution offered "three potential acts upon which the jurors might have rested their verdict." These three acts, she asserts, were oral copulation, kissing, and hugging. In her reply brief, Amy takes a different tack, arguing

that the multiple acts on which the jurors could have based the conviction were of only two types—oral copulation and kissing—but that this conduct could have constituted up to four different "acts," which were Amy kissing Jake while walking her dog, Amy kissing Jake outside her car after walking the dog, Amy kissing Jake inside her car after kissing him outside her car, or Amy orally copulating Jake inside her car.

Although we do not necessarily agree with Amy's suggestion that this conduct constituted the number of separate and distinct acts that Amy contends it does, we acknowledge that, at a minimum, the oral copulation and the kissing, or "making out," could each support a charge of lewd and lascivious conduct. A unanimity instruction was therefore required, and the court erred in failing to give one. We must therefore consider whether the error requires reversal.

There is a split of opinion as to whether the failure to give a unanimity instruction is subject to the *Chapman* standard or the *Watson*[10] standard of prejudicial review. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 185-186 [describing split of opinion as to applicable standard of harmless error for failure to give unanimity instruction].) We need not decide which test applies, because under either standard we reach the same conclusion, i.e., that the court's instructional error was not prejudicial under the particular circumstances of this case.

"[U]nder the mandate of *Chapman* . . . we must ultimately look to the evidence considered by defendant's jury under the instructions given in assessing the prejudicial

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10 *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*).

impact or harmless nature of the error." (*People v. Harris* (1994) 9 Cal.4th 407, 428, italics omitted.) "[W]e must inquire whether it can be determined, beyond a reasonable doubt, that the jury actually rested its verdict on evidence establishing the requisite [elements of the crime] independently of the force of the . . . misinstruction. [Citation.]" (*Id*. at p. 429, italics omitted.) The failure to give a unanimity instruction is harmless beyond a reasonable doubt where the record provides no rational basis, by way of argument or evidence, for the jury to distinguish between the various acts, and the jury must have believed beyond a reasonable doubt that a defendant committed all acts if he or she committed any. (*People v. Deletto* (1983) 147 Cal.App.3d 458, 473; see also *People v. Riel* (2000) 22 Cal.4th 1153, 1199.) Put another way, the relevant question is whether there was anything in the record by way of evidence or argument to support discriminating between two incidents such that the jury could find that appellant committed one lewd act but not the other. (See *People v. Deletto, supra*, 147 Cal.App.3d at pp. 466-467.)

Here, we can conclude beyond a reasonable doubt that the result would have been the same if the court had given a unanimity instruction. With respect to Amy's contention that the evidence of hugging and kissing provided two separate acts as to which the jury could have convicted Amy of lewd conduct, our review of the record indicates no rational basis, by way of argument or evidence, by which the jury could have distinguished between the acts of kissing and/or hugging in question. There was no danger that some jurors would find that Amy hugged Jake, but did not kiss him. The parties never distinguished between hugging and kissing. The defense was the same as to

all allegations of sexual contact between the two that was less than oral copulation ─ i.e., that Sarah was the identity in control and Amy was unconscious. Additionally, there is simply no evidence from which a reasonable juror could have determined that the prosecution proved beyond a reasonable doubt that hugging, but not kissing, occurred between Amy and Jake. Therefore, it is not reasonable to believe that some members of the jury would have believed that only kissing occurred, while others believed that only hugging occurred. If a juror was convinced that Amy inappropriately hugged Jake during the incident, then that juror would have had to have been similarly convinced that Amy kissed Jake as well.

There was similarly no danger that some jurors could find that Amy performed oral copulation on Jake, but did not kiss him, during their time together that day. No reasonable juror could have been convinced that only oral copulation occurred, since the evidence that kissing occurred was essentially undisputed. The main evidence regarding oral copulation were statements Jake made to police after the incident, which he contradicted in his testimony at trial, and Jonathan's statements to one of Amy's doctors to the effect that he had come upon Amy performing oral copulation on Jake in her car ─ a story that Jonathan had disclaimed by the time of trial. However, eyewitness testimony that Amy and Jake had been passionately kissing was never contradicted. Two third-party witnesses described the conduct, and Jake admitted it. If any jurors believed Jake's statements that the oral copulation occurred, then they could not have reasonably rejected his uncontroverted testimony that he and Amy kissed that day. In other words, even if some of the jurors were convinced beyond a reasonable doubt that Amy was guilty of

lewd conduct as a result of orally copulating Jake based on Jake's statements to police and Jonathan's statements to a doctor, those jurors could not have reasonably rejected the evidence that Jake and Amy had been romantically kissing during their time together that same day. Amy did not even challenge whether the "making out" conduct had taken place that day, as evidenced by defense counsel's closing argument. Rather, her position was that she was unconscious of what Sarah was doing with Jake. Consequently, we can conclude that any juror who may have believed that oral copulation took place would also inexorably have believed that kissing took place, too.

The state of the evidence compels the conclusion that the jury did not believe Amy's defense that she was unconscious while she was with Jake. Although the jurors were not convinced beyond a reasonable doubt that the oral copulation occurred, as evidenced by their finding Amy not guilty on count 1, they were clearly convinced that Amy committed a lewd act. The only evidence and argument presented at trial that could support that conviction was the overwhelming evidence that Amy "made out" with Jake during their time together. There is thus no reason to suspect that the verdict was not unanimous.

Under these particular circumstances, there is no reason to suspect that the jury might have reached a different result if the court had given a unanimity instruction. Although the court erred in failing to give a unanimity instruction, the error was of no practical consequence given the state of the evidence and the nature of Amy's defense.

2. *The trial court adequately instructed on the applicable lesser included offenses*

Amy contends that the trial court erred in instructing the jury on simple assault and simple battery ─ which are lesser included offenses to the offenses with which Amy was charged ─ by using the relevant CALCRIM instructions. According to Amy, the instructions "changed the definition of the lesser included offenses" by "requiring proof that the touching occurred in a 'harmful or offensive' manner, and implying it must be committed 'in a rude or angry way.'" Amy further asserts that if the trial court did not have a sua sponte duty to provide different instructions on the assault and battery offenses, then her trial counsel provided ineffective assistance by failing to request that the court give the CALJIC instructions rather than the CALCRIM instructions, or by failing to request that the court "omi[t] or clarif[y] . . . the terminology" she challenges on appeal.

a. *Additional background*

After the attorneys agreed to the court giving the CALCRIM instructions for simple assault and simple battery, the trial court instructed the jury with CALCRIM Nos. 915 (simple assault) and 960 (simple battery). The trial court gave the following instruction with regard to simple assault:

> "To prove that the defendant is guilty of the crime of simple assault, the People must prove that:
>
> "1. The defendant did an act that by its nature would directly and probably result in the application of force to a person;
>
> "2. The defendant did that act willfully;

"3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone;

"AND

"4. When the defendant acted, he had the present ability to apply force to a person.

"Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain advantage.

"The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

"The touching can be done indirectly by causing an object or someone else to touch the other person.

"The People are not required to show that the defendant actually touched someone.

"The People are not required to prove that the defendant actually intended to use force against someone when he acted.

"No one needs to actually have been injured by the defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault, and if so, what kind of assault it was."

The court gave the following instruction regarding simple battery:

"To prove that the defendant is guilty of Simple Battery, the People must prove that:

> "1. The defendant willfully and unlawfully touched Jacob T. in a harmful or offensive manner.
>
> "Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.
>
> "The slightest touching can be enough to commit a battery if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind."

b. *Analysis*

Amy asserts that the trial court should have altered, sua sponte, the CALCRIM instructions that it gave, or should have used the corresponding CALJIC instructions instead. According to Amy, use of the words "harmful" and "offensive" in the instructions was inaccurate because those words are not found in the statutory provisions outlining the offenses of simple assault and simple battery. She also challenges the use of "rude" or "angry" in the instruction[s] to describe the conduct. She contends that the use of these words confused the jury and "deprived her of proper consideration of simple battery and simple assault as lesser included offenses to the charged crimes."

According to Amy, the CALJIC instructions, as opposed to the CALCRIM instructions the court used, accurately state the law, and would have been less confusing to the jurors. By using the CALCRIM instruction, she contends, the trial court confused the jurors and/or altered the burden of proof as to the charges against her. Amy asserts that a kiss is considered "harmful" or "offensive" in the situation here only because "the law provides special protection to adolescents from adults." She maintains that this was

not clarified for the jury, and that as a result, the jury could have believed that in order to convict Amy of these lesser offenses, there had to be evidence that Jake felt offended or that he was somehow harmed by the kissing. She argues that this would have led the jury "to improperly reject the lesser included offenses outright." Under Amy's theory, the jury was given an "'all or nothing' choice between lewd act or acquittal."

"The trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence . . . ." (*People v. Blair* (2005) 36 Cal.4th 686, 744.) A trial court may refuse to give a proffered instruction if it is an incorrect statement of law, is argumentative, duplicative, or might confuse the jury. (*People v. Perez* (2008) 164 Cal.App.4th 1462, 1475.) If a jury instruction is a correct statement of the law, and the defendant fails to request a clarifying instruction, the defendant forfeits any challenge to the instruction on appeal: "The longstanding general rule is that the failure to request clarification of an instruction that is otherwise a correct statement of law forfeits an appellate claim of error based upon the instruction given. [Citations.]" (*People v. Rundle* (2008) 43 Cal.4th 76, 151 (*Rundle*), disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

CALCRIM Nos. 915 and 960, which the court used to instruct the jury, accurately state the law. Section 242 defines a battery as "any willful and unlawful use of force or violence upon the person of another." Section 240 defines an assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." The given instructions clearly covered the basic elements of both offenses.

Amy complains that the words "harmful" and "offensive" are not found in the statutory language. However, this language is found in case law interpreting the statute: "'[A]ny harmful or offensive touching constitutes an unlawful use of force or violence' and thus a battery under section 243.' [Citation.]" (People v. Pinholster (1992) 1 Cal.4th 865, 961.) The CALCRIM battery instruction incorporates judicial interpretation of the statute and accurately describes the state of the law on the offense of battery. The same reasoning applies to the instructions on assault. (See People v. Colantuono (1994) 7 Cal.4th 206, 216 ["assault is an incipient or inchoate battery; a battery is a consummated assault"].) Further, the jury was aware that the touching did not have to cause Jake "pain or injury of any kind," and thus could have reasonably concluded ─ without further instruction or adjustments to the CALCRIM instruction ─ that Jake did not have to be offended or harmed by the kissing, as Amy suggests. In addition, that portion of the relevant CALCRIM instructions that refers to "rude" or "angry" touching must be considered in context, i.e., that those words were used to explain that "even the slightest touching" may constitute a battery, which is also a true statement of the law. Amy has not established that the given instructions are incorrect statements of the law.

Because the challenged instructions are accurate statements of the law, Amy should have requested a clarifying instruction if she wanted the trial court to instruct the jurors that she could be guilty of a battery if her touching of Jake was offensive or harmful by operation of law, not because it was unwanted or done without Jake's

consent.[11] However, defense counsel did not make such a request, and Amy therefore forfeited her appellate challenge. (*Rundle, supra*, 43 Cal.4th 151; *People v. Coffman* (2004) 34 Cal.4th 1, 122.)

Amy also contends that her trial counsel provided ineffective assistance by failing to request a clarifying instruction with regard to the lesser included offenses. Even if we presume that the battery and assault instructions were warranted here, Amy cannot demonstrate that her counsel was ineffective with respect to these instructions. To establish ineffective assistance of counsel, a defendant must show that (i) counsel's performance was so deficient that it fell below an objective standard of reasonableness; and (ii) the deficient performance was prejudicial, rendering the results of the trial unreliable or fundamentally unfair. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 692.) To satisfy the prejudice requirement, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the

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11 Although the People did not raise this point in their briefing on appeal, the logical conclusion one must reach under Amy's argument in this regard is that she was not entitled to lesser included offense instructions. If, as Amy contends, the only basis on which her kissing Jake could be considered "harmful" or "offensive" is that "the law provides special protection to adolescents from adults," then Amy would be guilty of the lewd conduct or nothing at all. As she points out, there was no evidence that Jake considered her touching him to have been offensive or harmful. Rather, the evidence established that Jake approved of and assented to the touching. Thus, there was not sufficient evidence from which a reasonable juror could have concluded that Amy's touching of Jake did not amount to lewd conduct (i.e., conduct to which Jake could not legally consent because of its sexual nature), but could nevertheless be considered "unlawful force or violence" (§ 242) used against Jake. Under these particular circumstances, if Amy's conduct did not meet the standard for lewd conduct, then it did not amount to a criminal offense.

proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id*. at p. 694.)

In reviewing claims of ineffective assistance of counsel, we will not second guess trial counsel's strategic or tactical decisions. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1059.) If the record does not disclose the reasons trial counsel acted or failed to act in the manner challenged on appeal, we must assume counsel had a reasonable basis for acting or failing to act "unless the record . . . precludes the possibility of a satisfactory explanation" for trial counsel's action. (*People v. Ledesma* (2006) 39 Cal.4th 641, 746.)

The record does not reflect the reason for trial counsel's failure to request a clarifying instruction that the kissing did not have to have been done in a rude or angry manner, or that the victim did not have to be offended or harmed by the kissing. It is possible that trial counsel chose not to do so to avoid highlighting the fact that, as Amy puts it, "the law provides special protection to adolescents" such as Jake from the type of conduct that Amy was accused of in this case. Pointing out that Amy's conduct could be considered "harmful" or "offensive" only by operation of law would have served to further emphasize the nature of that conduct and the age difference between Jake and Amy. Because the record here does not "preclude[] the possibility of a satisfactory explanation" for defense counsel's failure to request a clarifying instruction, we "must assume" that "counsel had a reasonable basis" for failing to do so. Consequently, Amy cannot establish that her counsel was ineffective in this regard.

3. *The trial court did not prejudicially err with regard to Amy's defense of unconsciousness*

Amy contends that the trial court erred in limiting the testimony of Dr. Donald Fridley, Ph.D., a defense expert on DID, as to the issue of Amy's unconsciousness as a result of mental disorder. Amy further asserts that in limiting her expert's testimony, the trial court deprived her of her constitutional right to present a defense. Amy also claims that the trial court's instruction pertaining to her unconsciousness defense improperly shifted the burden of proof to her.

a. *Additional background*

The trial court ruled that Amy would be allowed to present evidence that she suffered from DID in offering her defense that she was legally unconscious during her conduct with Jake. The trial court was concerned, however, about the potential that Amy's expert would usurp the role of the jury. The attorneys and the court discussed the matter and appeared to reach a consensus:

> "The Court: I think that the expert can't opine that the defendant on November 20th during the alleged crime was unconscious. Okay? We all agree to that; correct?
>
> "Ms. Trevino: Yes.
>
> "Mr. Layon: Correct.
>
> "The Court: Okay. The question is, and where it gets amorphous around the edges is, can she[12] say that a person who suffers from

12 Although the court and attorneys use the pronoun "she" throughout some of this discussion, on appeal Amy claims that it was Dr. Fridley, a man, whose testimony the court unduly curtailed in its order regarding unconsciousness.

DID, when the new personality exhibits itself the old personality is unconscious.

"Ms. Trevino: Not unconscious. I don't think she can use that word.

"The Court: Give me another word.

[¶] . . . [¶]

"Ms. Trevino: But as it's being used it is a legal conclusion that the jury's going to be asked to find and is the ultimate issue with respect to November 20th.

"The Court: But isn't the jury allowed to hear an expert's opinion as to the ultimate issues as long as the jury still gets to decide the facts of the case?

"Ms. Trevino: The determination by the expert to the jury should not be whether or not she was or was not unconscious, but whether or not—specifically with respect to Count 2, whether or not she had the capacity to form the intent—not conscious or unconscious—whether or not she had the capacity to form the intent if she was—experiencing an episode of DID. Not either that she was [*sic*] or that she was conscious or unconscious."

The court and the attorneys then reviewed sections 29[13] and 28,[14] as well as Evidence Code section 805.[15] The court stated that Evidence Code section 805 is limited by section 29, such that even though an expert may opine about matters that "embrace[] the ultimate issue" in a case, the expert may not testify as to whether the defendant had the required mental state at the time of the offense. The attorneys agreed with the court's interpretation of the interaction between section 29 and Evidence Code section 805. The following colloquy then occurred:

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13 Section 29 provides: "In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact."

14 Section 28 provides: "(a) Evidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged.

"(b) As a matter of public policy there shall be no defense of diminished capacity, diminished responsibility, or irresistible impulse in a criminal action or juvenile adjudication hearing.

"(c) This section shall not be applicable to an insanity hearing pursuant to Section 1026.

"(d) Nothing in this section shall limit a court's discretion, pursuant to the Evidence Code, to exclude psychiatric or psychological evidence on whether the accused had a mental disease, mental defect, or mental disorder at the time of the alleged offense."

15 Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.

> "The Court: Okay. I want the parameters real clear. [¶] Then we go to unconsciousness; okay? The word 'unconsciousness,' it's defined in Penal Code section 26; right? It's an absolute defense.
>
> "Mr. Layon: Correct.
>
> "The Court: Okay. So it has a legal connotation and becomes the ultimate issue.
>
> "Mr. Layon: But the experts wouldn't be stating that on November 20th she was conscious or unconscious.
>
> "The Court: Okay. Now, if you agree with that then here's the problem: If I allow the expert or experts to testify as to the generalities that the defendant would be unconscious, or somebody suffering from this disorder would be unconscious, then what you're asking me to do is to have the jury – I'm going to have to instruct the jury to differentiate between unconsciousness as the expert states as applies to people who suffer from this disease generally, and unconsciousness as it is a complete legal defense for which you want an instruction. And it would be a heck of a lot easier if we could use something else describing the factual presentation of the defendant, or an individual with the affliction, by saying the individual would be unaware of the surroundings, would be unaware of the personality that's exhibiting itself, and what that personality is actually doing. Because I'm going to have to, when you[r] expert says: Oh, somebody like this would be unconscious, immediately instruct the jury: You are not to draw any legal opinions from the experts. Right? The expert cannot testify to an ultimate legal issue like that."

The attorneys and the court continued to discuss the matter, including problems of hearsay and foundation that might arise from the expert's testimony. Amy's attorney eventually said, "First of all, this whole issue may be obviated if the Court gives a definition of conscious or what consciousness is or unconscious is so I am able to tie it to aware, alert, not oriented." The following colloquy then occurred:

> "The Court: That's a good point. I think I should pre-instruct the jury on unconsciousness and consciousness.

"Mr. Layon: So if you allowed me to tie that together then I can work with that.

The Court: I think you're right. I think I should, and I will."

After an interruption in the discussion, the court and the attorneys moved on to other matters. The following day, the court offered a tentative ruling regarding Amy's use of expert testimony regarding DID:

"The Court: Okay. Now the next issue is we had a lengthy discussion in chambers and also on the record about the experts. And let me give you my firmly ro[o]ted tentatives. Okay? Because we had a lot of argument about them, I was able to reread the case last night and get my neurons attached again. [¶] . . . [¶] As to the ultimate issue, what I'm deciding is that Penal Code sections 28 and 29 are in the same section obviously as Penal Code section 26-Four [*sic*] as to unconsciousness. Unconsciousness is relevant and it's a mental defense. It's not the ultimate mental state; right? The mental state in question on Count 2 is a specific intent and on Count 1 is a general intent. And no expert can opine as to the specific intent of the individual at the time, nor even a general mental intent, but they can opine as to mental state.

"So your experts can testify that the defendant suffers from DID, that people with DID will display these type of symptoms, and in discussing unconsciousness that is the legal conclusion that I'm going to leave to the jury. So she can describe what it is up to defining it as unconsciousness. That is a legal issue that the jury is going to determine, and as you requested I am going to pre-instruct the jury as to unconsciousness. I am going to question them in voir dire. I'll pre-instruct them before trial, and then I'll instruct them at the close of trial."

After further discussion about the possibility of holding a hearing on the experts' testimony outside the presence of the jury, the court inquired whether Amy's attorney had any objections. The following exchange occurred:

"Mr. Layon: . . . I spoke with Dr. Fridley last night.

"The Court: Okay.

"Mr. Layon: And spoke with him about the Court's—what the Court expressed would be its tentative regarding the issue about using the word unconscious or conscious. And his response to me was that that word, specifically DID, embraces an altered state of consciousness and the word conscious is used in the DSM. And I specifically asked him, 'Are you going to be hamstrung if the judge orders you to use some sort of euphemism?' And he says that it's a word that's used in the DSM, so you can't talk about DID without ta[l]king about an altered state of consciousness. And I said, 'What about saying unaware, not alert, not oriented to place, time and those things? And he said, 'those are differen[t] issues.'

"The Court: How are they different? Unconsciousness, take it out of the legal context for a second. If you're a law enforcement official in the field, or you are an M.D. or you are out in the field and somebody is laying [*sic*] on the ground, and you said that person is unconscious. [¶] Somebody who is hearing that[,] who would not understand what unconscious is, what you have to do, and any medical professional would do this, any law enforcement official would do this, any firefighter would do this, is they would be required to explain what they see: The patient is l[y]ing supine. The patient is not responsive to verbal or painful command [*sic*]. The person is unaware of his or her surroundings. The person responds to painful stimuli purposefully. The person's eyelids are twitching. [¶] I mean, those are objective facts which others can evaluate and determine whether or not an individual is this label of unconscious. Unconscious is a conclusion.

"Mr. Layon: The Court's using the word unconscious, which is different than saying altered state of consciousness.

"The Court: That's fine. An altered state of consciousness doesn't bother me at all.

"Mr. Layon: What I was wanting was the word unconscious or conscious.

"The Court: He can't use conscious or unconscious and I don't care what the DSM says.

"Mr. Layon: Judge, I'm just telling you the expert's opinion, and he has been doing this for 30 years –

[¶] . . . [¶]

"The Court: I understand. And you are doing a great job; okay? But I'm not going to let an expert come in a courtroom and testify to ultimate legal issue [*sic*]. It isn't going to happen. If the Fourth DCA thinks I'm wrong then we all get to do this over again. But I heard all the argument yesterday, and I apologize to the doctor in advance for not wanting to accept his lingo, but I am going to follow the law in the State of California. [¶] What he is doing is applying clinical terms in a forensic setting, and that's not going to work. There are times where the defense asked me to have the prosecution not ask their expert a particular question, not let their expert opine about a particular issue. What's the difference here?

"Mr. Layon: Because telling them they can't opine on a specific issue and telling them they can't use specific language are different. Again, I don't want to beat a dead horse, we made a record. But just so I am clear, I am objecting to that. And just so I am clear, because I don't want to stray from the Court's ruling, what he indicated to me is what he would use to describe DID [is] an altered state of consciousness or somebody who is not conscious of what's going on about them.

"The Court: 'Not conscious,' not good. Altered level of consciousness, unaware of surroundings—he could even say, I think, and I'll hear from you Ms. Trevino, that—I've got to keep the names—that Amy would be unaware of Sarah and vice versa. Any objection to that?"

No further substantive discussion of the unconsciousness issue occurred at this point. With regard to instructing the jury on the defense of unconsciousness, the trial court originally agreed with the prosecutor's request to omit the word "blackout" from the list of things listed in CALCRIM No. 3425 that could cause unconsciousness. The court also agreed with a defense request to include the words "mental disease, defect or disorder" in that list.

During voir dire, but outside the presence of the jury, Amy's attorney again sought clarification of the court's ruling limiting the expert's testimony as to DID. The following discussion ensued:

> "Mr. Layon: I know you said we can't use the word 'unconscious,' but I think you did say, and my notes reflect, that you said the therapist can use the phrase, that 'she was not conscious.' I still just don't want to stray from the Court's ruling.
>
> "The Court: No. I think you got it absolutely wrong what I said. I don't want the expert to opine to make a legal finding and direct the jury as to unconsciousness or consciousness. That's up to the jury. That's the instruction that you want given. I discussed with you they can talk about the objective facts of what an individual with DID might present with, what she presents with when they've evaluated her before. But as to the word 'unconsciousness,' no.
>
> "Mr. Layon: I know, and they can't use the word 'unconscious,' but in describing DID, using objective phraseology, they can say ' one would not be conscious.
>
> "The Court: One would be unaware of their surroundings, would be unable to respond to painful stimuli, to verbal stimuli, would not appear awake. I mean, those types of things, yes. The word 'unconsciousness' and 'consciousness' ─ remember you brought up Mr. ─ Dr. Fridley saying, Well how can he testify? This is how he has always done it, and he wants to mention unconsciousness. That's great for him in a clinical setting, but not in a for instance setting."

The court instructed the jurors during voir dire as follows with regard to the legal defense of unconsciousness:

> "The defendant is not guilty . . . if she acted while legally unconscious. Someone is legally unconscious when she is not conscious of her actions. Someone may be unconscious even though able to move. Unconsciousness may be caused by an epileptic seizure, involuntary intoxication, or mental disease, defect or disorder. The People must prove beyond a reasonable doubt that the defendant was conscious when she acted. If there is proof beyond a

> reasonable doubt that the defendant acted as if she were conscious, you should conclude that she was conscious. If, however, based on all the evidence, you have a reasonable doubt that she was conscious, you must find her not guilty."

The court's final instruction to the jury on the unconsciousness defense was the same, except that it included "sleepwalking" as an additional possible cause of unconsciousness.

b. *Presuming that the court erred in prohibiting the expert from using the words "conscious" or "unconscious," any such error was harmless under the circumstances*

Amy asserts that the trial court deprived her of the right to fully present her defense by precluding Dr. Fridley from using the words "conscious" or "unconscious," or their derivatives. Amy contends that "an adequate explanation of DID was necessary to address the specific intent element of count two." According to Amy, the "trial court improperly and unduly restricted appellant's expert[] under the mistaken notion that using the terminology of 'unconsciousness,' . . . would constitute an opinion on the ultimate issue in dispute ─ whether appellant was, in fact, legally unconscious at the time of the alleged conduct."

"As a general rule, the opinion of an expert is admissible when it is '[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact . . . .' [Citation.] Additionally, in California: 'Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.' [Citation.] However, the admissibility of opinion evidence that embraces an ultimate issue in a case does not

bestow upon an expert carte blanche to express any opinion he or she wishes. [Citation.] There are limits to expert testimony, not the least of which is the prohibition against admission of an expert's opinion on a question of law." (*Summers v. A. L. Gilbert Co*. (1999) 69 Cal.App.4th 1155, 1178, citing Evid. Code, §§ 801, subd. (a), 805.) "Even if an expert's opinion does not go to a question of law, it is not admissible if it invades the province of the jury to decide a case." (*Id*. at p. 1182.)

A trial court's discretion to admit evidence of a mental disorder is constrained by statute. Section 28, subdivision (a) provides that evidence of mental disease, defect, or disorder is not admissible "to show or negate the capacity to form any mental state," but is admissible solely on the issue whether the accused "actually formed a required specific intent . . . when a specific intent crime is charged." Section 29 contains a similar limitation on the admissibility of evidence of a defendant's mental state, providing: "In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact."

As both attorneys agreed, the trial court clearly could preclude Dr. Fridley from opining as to whether Amy was or was not conscious during the conduct that occurred on November 20, 2005. However, the question is whether the trial court's decision to prevent the expert from using the words "conscious" and "unconscious" went beyond the

limitation imposed by section 29 that an expert not testify "as to whether the defendant had or did not have the required mental states."

The trial court was clearly concerned that permitting Dr. Fridley to opine as to whether Amy would be considered unconscious if or when her alter identities came forward could usurp the jury's role to determine whether Amy was legally unconscious at the time of the illegal conduct, or could lead to the jury being confused about the meaning of "unconscious" as a medical term as opposed to its meaning as a legal term. However, the trial court could have provided a clarifying instruction with regard to the expert's use of the terms "unconscious" or "conscious" that would have addressed these concerns. It would appear that the trial court went beyond the requirements of section 29, and erroneously prevented the expert from explaining whether a host identity could be considered unconscious when an alter takes over.

However, even assuming that the trial court abused its discretion in preventing Dr. Fridley from testifying that a host identity might be unconscious (or not conscious) when an alter identity is in control, Amy cannot establish that it is reasonably probable that the court's limitation on Dr. Fridley's testimony affected the outcome of her case, under the standard of prejudice announced in *Watson, supra*, 46 Cal.2d at page 836.[16]

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16 Amy suggests that the court's error with regard to Dr. Fridley interfered with her right to present a defense to such a degree that it violated her constitutional rights. She suggests that the error should therefore be reviewed for prejudice under the harmless beyond a reasonable doubt standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. This contention is without merit. "Application of the ordinary rules of evidence. . . .does not impermissibly infringe on a defendant's right to present a defense. [Citation.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 440.) Even erroneous limitations

The diagnostic criteria for DID identified in the edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) that Amy offered as proof in her motion in limine do not include the words "conscious," "consciousness," "unconscious," or "unconsciousness." Rather, a diagnosis of DID can be made under the following circumstances:

> "A. The presence of two or more distinct identities or personality states (each with its own relatively enduring pattern of perceiving, relating to, and thinking about the environment and self).
>
> "B. At least two of these identities or personality states recurrently take control of the person's behavior.
>
> "C. Inability to recall important personal information that is too extensive to be explained by ordinary forgetfulness.
>
> "D. The disturbance is not due to the direct physiological effects of a substance (e.g., blackouts or chaotic behavior during [a]lcohol [i]ntoxication) or a general medical condition (e.g., complex partial seizures). Note: In children, the symptoms are not attributable to imaginary playmates or other fantasy play."

In addition, within the entire single-spaced, three-page description of DID and its features in the DSM IV-TR, the term "consciousness" appears only once, in the following sentence: "Dissociative Identity Disorder reflects a failure to integrate various aspects of

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placed on a defendant's presentation of evidence generally do not rise to the level of depriving a defendant of his or her constitutional right to present a defense: "'Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense. [Citation.] If the trial court misstepped, "[t]he trial court's ruling was an error of law merely; there was no refusal to allow [defendant] to present a defense, but only a rejection of some evidence concerning the defense." [Citation.] Accordingly, the proper standard of review is that announced in *Watson* [, *supra*,] 46 Cal.2d [at page 836], and not the stricter beyond-a-reasonable-doubt standard reserved for errors of constitutional dimension [citation].' [Citation.]" (*People v. Boyette* (2002) 29 Cal.4th 381, 427-428.)

identity, memory, and consciousness." The description does not use the terms "conscious," "unconscious," or "unconsciousness." Significantly, Dr. Fridley was permitted to tell the jury, without objection or limitation by the court, that "the basic three criteria for a DID diagnosis would be a disturbance in consciousness, a disturbance in identity and disturbance in memory." Dr. Fridley thus was able to use the word "consciousness" during his testimony in a manner consistent with how the word is used the DSM-IV-TR description of DID. Considering the fact that the diagnostic manual that mental health professionals use to determine whether a person suffers from DID employs the word "consciousness" to describe the disorder only once, it is difficult to see how Amy's expert would have been unduly limited by the court's ruling limiting his use of the words "consciousness" or "unconsciousness," particularly when the court permitted him to use the word "consciousness" in precisely the manner in which it is used in the diagnostic manual.

Further, Dr. Fridley provided extensive testimony on DID and what occurs in individuals who are diagnosed with the disorder, thereby giving the jury a good sense of the disorder and how it might have affected Amy. There are a variety of ways to describe what constitutes being in a dissociative identity state. Amy's expert was able to use the full range of terms used in the description of DID in the DSM-IV-TR ─ even its use of "consciousness," and thoroughly explained to the jury the meaning of "dissociation":

> "A. [Dissociation is an] umbrella symptom. It has many, many different forms being experienced.
>
> "Q. Can you share with us what those forms are?

"A. Dissociation starts any time you disconnect from both the feelings or the outside events that are taking place for you. Dissociation occurs – sometimes it's called road hypnosis. You are driving down the highway and you'll go through a signal and you'll think: Oh, my gosh. I am not sure if I remember if that was red or green. Dissociation occurs when you trans-out. You can sit in front of a TV and you just kind of don't remember what was going on. Those all would be in the realm of what would be called normal dissociations.

"Q. Is there something called abnormal dissociation?

"A. Abnormal dissociations occur when you begin to not be able to know you're in your body. You actually really feel yourself outside your body. You feel yourself leaving your body. Dissociation occurs when you look around you and the room doesn't look real, when people don't look quite real to you, or you are very far away and it doesn't seem real. And those can become quite disturbing to where you then begin to hear yourself saying things and you had no idea you were going to say it. It's like somebody said it for you.

"And you then can go to where you don't even feel like yourself. You can feel that you are somebody else. Then you can have periods where you have no memory for what went on and you, in essence, wake up at the store and don't know how you got there."

Dr. Fridley explained how a dissociating individual might "appear . . . to be normal" while having an amnestic dissociation, but that he or she would not "know what's going on" when that individual stops dissociating:

"Q. All right. Now, when you talk about waking up, are you talking about somebody that's asleep and then opens their eyes and wakes up, or are you talking about ─

"A. No, we are talking about a subjective experience where I don't remember getting here. And so people who have that memory: I don't remember getting here, they call it waking up. It's like they don't know where they were. Obviously, they were walking around and functioning in some capacity, but they have no memory for what just took place. So it's kind of a very disorganizing experience.

"Q. And as they are walking around and functioning, do they appear on the outside to be normal on some level?

"A. Most of the time.

"Q. But, in fact, they're having an amnestic event that they don't know what's going on?

"A. Right."

When Amy's attorney asked Dr. Fridley about DID, specifically, Dr. Fridley gave a lengthy explanation, and noted that a "disturbance in consciousness" is one of the three criteria for a DID diagnosis. After Dr. Fridley explained that, Amy's attorney turned his attention to the subject of "pseudo seizures," and did not seek further comment on what the diagnostic criteria meant:

"Q. Let me ask you specifically about D.I.D. dissociative identity disorder, what can you tell us about that?

A. Well, it's – unfortunately it's been over Hollywood-ized in some ways. The reason that the term was changed from multiple personality disorder to dissociative identity disorder is because [*sic*] a lot of the portrayals which were made in the media about it. But what it means is that you actually *have* an experience of feeling that you are not who you are. You feel – for instance, you might feel that you have become a child. And if you have complete amnesia you then act like a child, may talk like a child. And if I ask you what year it is, you may tell me it's 1990 and that's what you believe in that particular state and you may even call yourself by the name. And those states of identity switch from one to another. The typical number of identities when a patient is first diagnosed is usually about two or three. And the average number which is, of course, discovered in treatment could be 10, 13, somewhere in that range.

"Q. Different personalities?

"A. Different identities. The key word there is identity because it's the experience of who I am that we are talking about.

[¶] . . . [¶]

"Q. Can you tell us what the symptoms are of D.I.D.?

"A. Well, the basic three criteria for a D.I.D. diagnosis would be a disturbance in the consciousness, a disturbance in identity and disturbance in memory.

"Q. All right. Would something like – are you familiar with the term 'pseudo seizures'?"

Dr. Fridley was also permitted to opine that it frequently occurs that when the alter comes to the forefront, there can be a period of amnesia, such that the host is unaware of what the alter is doing. He was later asked whether "when an alter comes forward sometimes there is an instance of an amnestic event," to which he responded, "Well, if I understand you, in other words, when, let's say, part A comes forward and in the body, Part B may have no awareness. . . . [¶] . . . In other words, part B is *totally unaware of anything that happened while A is present*." (Italics added.) Dr. Fridley was thus able to explain to the jury that with DID, one alter identity's conduct might be entirely unknown to the host or to other alters, which was the core of Amy's defense—i.e., that she, Amy, was wholly unaware of what Sarah was doing during the incident in question. Dr. Fridley also was able to tell the jury that Amy had reported "uncontrollable switching" between her identities after her grandmother died.

Dr. Fridley explained to the jury that when an alter is at the forefront the host might not have any knowledge that the alter took control of the person's body and would

have no memory of the event, even though the host's body would appear to be functioning normally while the alter was in control:

> "Q. Further assume that in the presence of the young man that the alters are triggered [or the] alter is triggered that comes to the forefront, would that result or could that result in an amnestic event as to the host?
>
> "A. Yes.
>
> "Q. Such that the host wouldn't know what was going on when the alter is at the forefront?
>
> "A. Again, that's one of the criteria for dissociative identity disorder, that there are periods of amnesia where an alter takes over the sense of agency about behavior and another part has no memory for that.
>
> "Q. And at the time that the host – at the time that the alter is at the forefront and the host is experiencing an amnestic event, that is, they don't know what's going on, would they appear on the outside to be fully functional?
>
> "A. Completely.
>
> "Q. And they could drive a car?
>
> "A. They can drive a car.
>
> "Q. They can send an e-mail?
>
> "A. They could send an e-mail.
>
> [¶] . . . [¶]
>
> "Q. And the host would not know what's going on?
>
> "A. And the host would have no memory."

The record does not support Amy's contention that the court permitted Dr. Fridley to present "only a diluted and benign version of Amy's disorder."

In addition to presenting Dr. Fridley's testimony, Amy was permitted to offer testimony from two additional mental health professionals who were aware of her DID diagnosis. They explained what they experienced with Amy that suggested to them that she was presenting with multiple identities. In sum, Amy was able to present a thorough defense on the issue of DID. Further, although Amy complains that the jury was not permitted to hear from Dr. Fridley that when he spoke of "awareness" it meant the same thing as "consciousness," the jury could have reached this conclusion on its own by applying the commonly understood meaning of "conscious" when it considered the jury instructions. Under these circumstances, it is not reasonably probable that if Dr. Fridley had been allowed to use the words "unconscious" or "conscious," the jury would have returned a result more favorable to Amy.

c. *The trial court did not improperly shift the burden of proof to Amy by instructing the jury with CALCRIM No. 3425*

Amy contends that the trial court's instruction that the jury should conclude that Amy was conscious if it "found proof beyond a reasonable doubt that [she] acted 'as if she were conscious,'" created a "mandatory presumption in favor of guilt."

Amy relies on *People v. Williams* (1971) 22 Cal.App.3d 34, 55-56 (*Williams*), and *People v. Maxey* (1972) 28 Cal.App.3d 190, 199-201 (*Maxey*), both of which dealt with CALJIC instructions Nos. 4.30 and 4.31, which involve instructions on unconsciousness.

Amy's reliance is misplaced. Both *Williams* and *Maxey* were decided before the Supreme Court decided the issue in *People v. Babbit* (1988) 45 Cal.3d 660 (*Babbit*).[17]

In *Babbit, supra*, 45 Cal.3d at page 693, the Supreme Court upheld nearly identical language found in CALJIC No. 4.31 against a challenge similar to the challenge Amy levels against CALCRIM No. 3425. The defendant, Babbit, was charged with murder. One of the theories put forward by the defense was that Babbit had been legally unconscious during the killing due to a psychomotor epileptic seizure. (*Babbit, supra*, 45 Cal.3d at p. 689.) The jury was instructed pursuant to CALJIC No. 4.31: "'If the evidence establishes beyond a reasonable doubt that at the time of the commission of the alleged offense the defendant acted as if he were conscious, you should find that he was conscious, unless from all the evidence you have a reasonable doubt that he was in fact conscious at the time of the alleged offense. [¶] If the evidence raises a reasonable doubt

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17 *Williams*, in particular, is inapposite, since it dealt with the pre-1972 version of CALJIC No. 4.31. (*Williams, supra*, 22 Cal.App.3d at p. 57 [holding the prior version required a finding of fact, as opposed to establishing a rebuttable presumption as to which the defendant could simply to raise a reasonable doubt as to consciousness].) Further, the *Williams* court concluded that the trial court should have instructed the jury with language similar to the language the court used in this case: "[The court] should have composed an instruction that informed the jurors that if they found beyond a reasonable doubt that defendant acted as if he were conscious, a rebuttable presumption arose that he was conscious, as to which defendant had the burden of raising a reasonable doubt." (*Williams, supra*, 22 Cal.App.3d at p. 57.) The *Williams* court's issue with the instruction was the fact that the instruction required the jury to make a "conclusive finding of fact" with regard to consciousness, rather than simply consider the existence of a "disputable presumption."

that he was in fact conscious, you must find that he was then unconscious.'"[18] (*Id*. at p. 691, fn. 9.)

The *Babbit* court concluded that CALJIC No. 4.31 did not shift the burden to the defendant to negate an element of the offense. As the court explained: "'[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the non-existence of all affirmative defenses has never been constitutionally required[.]'" (*Babbit, supra*, 45 Cal.3d at p. 692, quoting *Patterson v. New York* (1977) 432 U.S. 197, 210.) Babbit argued, however, that where the defendant "negatives an element of the offense . . . , the prosecution [must] prove the absence of the asserted defense beyond a reasonable doubt and without the assistance of a presumption." (*Id*. at p. 693.)

The *Babbit* court disagreed with this assertion, explaining: "Although the state, once the defendant raises the issue, has assumed the burden of disproving unconsciousness, this fact of itself does not transform absence of the defense ─ consciousness ─ into an element of murder for purposes of due process analysis. This is

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18 Compare this language with the language in the instruction that Amy challenges: "The People must prove beyond a reasonable doubt that the defendant was conscious when she acted. If there is proof beyond a reasonable doubt that the defendant acted as if she were conscious, you should conclude that she was conscious. If, however, based on all the evidence, you have a reasonable doubt that she was conscious, you must find her not guilty."

Clearly, both instructions include the "defendant acted as if [he or she] were unconscious" language that Amy points to in CALCRIM No. 3425 as creating an unfair presumption of guilt.

true even though unconsciousness negates the elements of voluntariness and intent, and when not voluntarily induced is a complete defense to a criminal charge. [Citations.]" (*Babbit, supra*, 45 Cal.3d at p. 693.) The court summarized its holding as follows:

> "[B]ecause consciousness is not an element of the offense of murder (nor of any offense), CALJIC No. 4.31 does not impermissibly shift to the defendant the burden of negating an element, nor does the instruction violate due process by impermissibly lightening the prosecution's burden of proving every element beyond a reasonable doubt. Consequently, there is no constitutional impediment to the state's use of a rebuttable presumption in meeting its assumed burden ─ once the issue has been raised ─ to prove consciousness beyond a reasonable doubt. [Citations.]" (*Id*. at pp. 693-694.)

The *Babbit* court also noted that CALJIC No. 4.31 could not be considered "in a vacuum," and that the additional instructions, including that "if [the jury] had a reasonable doubt that defendant was conscious, it *must* find him not guilty," ensured that CALJIC No. 4.31 "did little more than guide the jury as to how to evaluate evidence bearing on the defendant's consciousness and apply it to the issue, an issue that is capable of proof only by circumstantial evidence of the defendant's conduct." (*Babbit, supra*, 45 Cal.3d at pp. 695-696.) The court concluded "that given the entirety of the charge a reasonable juror could not have believed that defendant was required to persuade it that he was unconscious. Rather, the instructions taken as a whole clearly indicate the prosecution had the burden of proving beyond a reasonable doubt *not only that defendant appeared to be conscious, but also that he in fact was conscious*. [Citations.]" (*Id*. at p. 696, italics added.)

CALCRIM No. 3425 includes language that is nearly identical to that cited by the *Babbit* court as a basis for upholding the challenged language in CALJIC No. 4.31.

There is thus no basis to conclude that the trial court's instruction on unconsciousness did anything other "than guide the jury as to how to evaluate evidence bearing on the defendant's consciousness and apply it to the issue . . . ." (*Babbit, supra*, 45 Cal.3d at p. 696.)[19]

4. *The trial court committed harmless error in admitting evidence of Amy's prior act of infidelity*

Over objection, the trial court permitted the prosecutor to present evidence that in October 2002, Amy had an extramarital affair while Jonathan was out of town for business. Amy contends that the trial court abused its discretion in admitting this evidence since the affair was with an adult male, and occurred three years prior to the charged offenses. According to Amy, this evidence was extremely prejudicial to her, while being minimally relevant to her case.

a. *Additional background*

The prosecutor asked Jonathan, "And while you were out of town [in 2002] Amy had an affair, didn't she?" Amy's attorney objected to the relevance of the evidence the prosecutor was attempting to elicit. The trial court took a recess to allow the attorneys to argue the matter outside the presence of the jury. The prosecutor's theory was that the evidence was admissible to establish a pattern of behavior on Amy's part, in that it was

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19 While we conclude that the trial court's instructing the jury with CALCRIM No. 3425 was not error, we observe that the challenged language is arguably misleading under the circumstances of this case. The jury could have believed that it had to find that Amy was conscious if Amy appeared to be conscious, even if an alternative identity was in control. However, given the instructions as a whole, it appears that the jury was aware that it should conclude that Amy was conscious only if there was proof beyond a reasonable doubt that *Amy* acted as if she, and *not* an alternative identity, was conscious.

Amy, not an alter identity, who was having the affair. The prosecutor suggested that having affairs "is the way [Amy] behaves," and that "this episode with Jake was no different . . . ." Defense counsel objected that the evidence was irrelevant, that it constituted improper character evidence, and that it was far more prejudicial than probative.

The trial court concluded that the evidence was relevant to Jonathan's credibility, and in particular, to his testimony about how Amy reacted to different stressors. The court stated:

> "All right. First of all, the evidence is going to come in and it's not for character evidence. I just allowed, over the prosecutor's objections, a day's worth of hearsay to come in for limited purposes of Mr. Piumelli describing the defendant's reaction and many statements of experts, and also of the defendant as to her level of consciousness or ability to respond. That she appeared to be a different person during an encounter. I don't' know what the encounter was because the victim on the stand testified . . . that nothing happened, but was impeached with a prior inconsistent statement that there was oral copulation.
>
> "The victim did testify, however, that there was kissing between he and Mrs. Piumelli. This information that the DA is trying to elicit appears to go to Mr. Piumelli's reaction and also his observance of Mrs. Piumelli's reactions that Mr. Piumelli has so carefully recited in the last day of testimony. So I think it does go to credibility as for the 352 balancing. The question is, is it unduly prejudicial compared with the probative value."

The trial court then engaged in an analysis pursuant to Evidence Code section 352, assessing the potential prejudicial effect of the evidence of the affair:

> "As to the prejudicial effect, I kind of wonder how prejudicial it is since the jury has heard, number 1, that the defendant Mrs. Piumelli has been involved with a young man. . . . And also . . . that at the start of cross-examination there was information that wasn't objected

> to regarding that Mrs. Piumelli was pregnant on the creation of the relationship between Mr. and Mrs. Piumelli. So I assumed that all the parties have this as part of their plan during this trial with this information going to come in. [¶] I'm surprised that, number 1, there wasn't an objection to it, and number 2, that the DA didn't question about the reaction. Because that seems to be the core of the case for Mr. Piumelli is what Mrs. Piumelli's reaction is to all of these separate events and whether or not she has some different personality that is engaged in the sexual conduct."

The court ultimately concluded that the evidence was more probative than prejudicial and allowed the prosecutor to inquire of Jonathan about his and Amy's responses to each other in the aftermath of her affair:

> "But I'm trying to weigh the evidence and put together consistent – rule on consistent objections, and I think that what the jury has in front of it right now [are] questions about how the defendant reacts to specific events. [¶] Here she was, pregnant [by] another individual. She marries [Jonathan]. Has some type of relationship with [Jake], and like I said before, you did a very good job of illuminating how -- [Amy's] reaction to events, and what [Jonathan]'s reactions are, based on those events. So the information is going to be admissible for credibility. That doesn't mean that it's a turkey shoot here and we are going to go into this to the Nth degree."

b. *Analysis*

Amy contends that the evidence of her affair with another consenting adult was inadmissible pursuant to Evidence Code section 352 because the probative value of the evidence was substantially outweighed by the probability of undue prejudice. She argues that because of the prejudice resulting from the error, her conviction must be reversed.

Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) However, even evidence that is relevant may be excluded "if its probative value

is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evidence Code, § 352.) "We apply the deferential abuse of discretion standard when reviewing a trial court's ruling under Evidence Code section 352. [Citation.]" (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

The trial court considered the evidence of Amy's prior extramarital affair to be relevant to Jonathan's credibility in discussing the role of Amy's alter ego with regard to her relationship with Jake. The People suggest that because Amy's defense was that she was operating under a separate identity when she was with Jake, evidence regarding her earlier affair was "relevant to the credibility of Jonathan's story because it showed that Amy did not have another personality take over when she was unfaithful to Jonathan on a prior occasion." According to the People, "evidence of [Amy's] prior affair was relevant to see if she had the same behavioral patterns and same memory loss as she was claiming with [Jake]."

Amy asserts that this evidence was minimally relevant and "highly inflammatory," and that its admission permitted the prosecution to "unjustly attack Amy's character by demonizing her as an unfaithful, ungrateful, immoral and dishonest wife while belittling the severity and extent of her mental illness."

It appears that this evidence was not relevant to Jonathan's credibility on the matter of whether Amy showed signs that Sarah was present after she was caught with Jake. If Jonathan had testified that Amy acted differently and seemed as if she was under the control of an alter in 2002, when the prior affair took place, the evidence would have

been relevant to his credibility, since the evidence demonstrated that Amy did not begin to exhibit the symptoms of DID in 2005.[20] However, Jonathan did not testify to this effect. Thus, the prejudicial effect of the evidence of Amy's extramarital affair outweighed its minimal probative value. Clearly the evidence of Amy's prior affair could not be directly related to her conduct with Jake or to her defense, since the prior affair was not similar to her relationship with Jake, and she did not appear to doctors to be suffering from DID at the time of the affair. Therefore, how Amy responded in the face of Jonathan discovering her prior infidelity was not relevant to the jury's determination of what occurred in 2005. When weighed against the potential prejudice to Amy from the jury being informed that Amy had been unfaithful to her husband even before the incident with Jake, the evidence was simply not sufficiently probative to warrant its admission.

Although we agree with Amy that the evidence was more prejudicial than probative, we do not agree that the evidence was as prejudicial as Amy contends. The standard for determining prejudice as to a claim that evidence was erroneously admitted is that articulated in *Watson, supra*, 46 Cal.2d 818. (*People v. Carter* (2005) 36 Cal.4th 1114, 1171.) Under that standard, we consider whether it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error. (*Id*. at p. 1171.) Based on the record in this case, we cannot conclude that it is

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20 Clearly Amy exhibited symptoms of other mental disorders for some time, but her treating psychotherapist determined that Amy was presenting with DID in the spring of 2005.

reasonably probable that Amy would have received a more favorable result if evidence of her prior infidelity had not been admitted.

The evidence of Amy's prior affair was minimal in the context of all of the evidence that the People presented at trial. The prosecutor's questioning about this matter comprises approximately two pages of a 1,110-page plus trial transcript. Further, the prosecutor elicited only limited information from Jonathan about the affair, predominately inquiring about Amy's behavior after Jonathan discovered the affair. The prosecutor did not seek any salacious details or attempt to portray Amy in a negative light, and many of the prosecutor's questions seemed to be getting at Jonathan's response to finding Amy with another man, and whether Jonathan reacted in a manner similar to how he responded when he found Amy with Jake. When placed in the context of the entire trial, it is unlikely that this limited testimony about a prior incident of infidelity played a role in the jury's rejection of Amy's defense that she was unconscious while Sarah was in control that day.[21]

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[21] We also note that the evidence of Amy's affair was not necessarily entirely prejudicial to Amy. It is possible that if the jury had been inclined to believe Amy's defense and Jonathan's description of his wife's odd behavior when she was caught with Jake, the evidence of her different behavior after being caught being unfaithful at an earlier point in time could have bolstered her defense. Similarly, a jury could have believed that the fact that Amy had previously had an affair with an adult man when she did not seem to be suffering from DID suggests that it really was Amy's 14-year-old alter Sarah who was engaging in sexual behavior with a 15-year-old boy, and not Amy. In other words, if Amy chose an extramarital relationship with an adult before, then maybe the choice to have an extramarital relationship with a teenage boy had been Sarah's.

Under these circumstances, we conclude that it is not reasonably probable that Amy would have received a more favorable result if the trial court had excluded evidence of her prior affair. Any error with regard to this evidence was therefore harmless.

IV.

DISPOSITION

The judgment as to Amy is affirmed. The judgment as to Jonathan is reversed insofar as the probation order imposes alcohol testing conditions on Jonathan; in all other respects, the judgment is affirmed. On remand, the trial court is directed to strike the conditions of probation requiring Jonathan to submit to alcohol testing.

AARON, J.

WE CONCUR:

HALLER, Acting P. J.

O'ROURKE, J.